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In The

Supreme Court of the United States

October Term, 1993

ROBERT PATRICK GUIMONT, ET AL.,

Cross-Petitioners,

v.

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the nexus analysis of the takings issue set forth in *Nollan v. California Coastal Commission* apply to development exactions when the item demanded by government is not real property, but is money?

2. When the Washington Supreme Court has determined that levying a particular development fee (exaction of money) is an attempt to shift the economic burden of solving low-income housing needs onto a few individual property owners, and further has concluded that property owners are not significantly more responsible for this society-wide problem than the rest of the population, did the court err in nevertheless concluding that imposition of the fee does not constitute a taking without just compensation?

LIST OF PARTIES

Appellant before the Washington Supreme Court and Petitioner before this Court is the Director of the Department of Community Development, an agency of the State of Washington.

Respondents before the Washington Supreme Court and Respondents and Cross-Petitioners before this Court are: ROBERT PATRICK GUIMONT and WILLIAM PATRICK GUIMONT, dba National Trailer Park; WINIFRED ROOSENDAAL, dba Gables Motel; LARRY KLAAS, dba ISSAQUAH VILLAGE RV & MOBILE HOME PARK; RONALD SIMOSKY, KATHRYN ANDERSON and DARLENE YOUNG, dba Country Manor Mobile Home Park; FRANKLIN W. EVANS and JOANN S. EVANS, dba University Trailer Park; FRANCES SHOOK, dba Blockhouse Mobile Home Park; LES ROWLAND, dba Les Rowland Enterprises; KEITH MALCOM, dba Mill Village Mobile Home Park; CLIFFORD H. SANDS and NORMA N. SANDS, dba Sands Mobile Home Park; LONNEY FORD and MAX FORD, dba Royal Apartments and Mobile Park; ALVIN RICHARDSON and BONNY RICHARDSON, dba Riverside Mobile Park; ADA STRATTON, dba Spacette Mobile Court; WALLACE R. BARNETT, dba Olivia Park Trailer Court; STEPHEN J. KOLCSEY, dba Mobile Home Wonderland; BETTY MAE BERMAN, dba Central Valley Mobile Home Park; JOHN M. GRAHAM, dba North Bend Mobile Home Park; V.O. MANASCO, dba Manasco's Mobile Home Park; JOSEPH LEE and PENELOPE A. LEE, dba Linden Square; STAN DELONG and T.R. GILLESPIE, dba Camelot Square

LIST OF PARTIES – Continued

Mobile Home Park; HILDA W. WOTHE, dba Fall City Mobile Park; KARL GRASSE, dba Evergreen Mobile Home Park; JAMES CARRIERI and MELINDA CARRIERI, dba Brewster Motel; S. ANDERSON, dba Redmond Mobile Manor; ED COYLE, dba Harbor Mobile Estates; RONALD W. MYERS and DARYL W. NOYD, dba Cascadia Mobile Home Park; JOHN MASSMAN and SHIRLEY A. MASSMAN, dba Lone Cedar Mobile Home Park; MARVEL I. OLSEN, dba Laurelwood Park; JEAN E. EARL, dba Town Mobile Park; MICHAEL SPENCER and RUTH SPENCER, dba Red Gate Mobile Home Park; KINNEY H. LEONARD and IRENE R. FRAZIER, dba Bow Lake Trailer Town; LINDA LEE HUNTLEY, dba East Trent Mobile Home Park; WILLIAM STOTTS and LILLIAN STOTTS, dba Bill and Lil's Mobile Home Court; FRED DETERT and NONA DETERT, dba Brookside Mobile Park; REX BIRCHALL, dba Eastgate Mobile Home Park; MICHAEL J. LANG, dba Cedar Lane Park; KATHY BEGGS and VAN THOMAS, dba Alpine Estates Mobile Home Park; THOMAS L. THORNTON and NANCY K. THORNTON, dba Tyee Valley Mobile Home Park; FRANK K. ROSS, dba Ross Trailer Park; WILLIAM J. CARRUTH and CARL D. HANSON, dba Cedar Park; B. McKISSEN and H. McKISSEN, dba Liberty Village Mobile Home Park; ROBERT L. COLLOP, dba Angel Lake Mobile Home Park; BRUCE W. ROWE, dba Northwest Mobile Estates; PARTICIA SEVERSON, dba Leisure Manor Mobile Home Park; DOROTHY GRANT ELWAY, dba Carriage Club Estates; GLENN E. BROWN and SUSAN T. BROWN, dba Tyee Trailer Court; LESTER J. CHRISTOPH

LIST OF PARTIES – Continued

and IRENE J. CHRISTOPH, dba Hi-U Mobile Home Park; MARINA PANNI, dba Shady Glen; HENRY MILLER and RUTH MILLER, dba Loganberry Park, Mobile Home Park [sic]; WASHINGTON MANUFACTURED HOUSING ASSOCIATION; BEAR CREEK ASSOCIATES.

There is no parent or subsidiary company of a corporation to be listed.

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No. 93-927

In The

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October Term, 1993

ROBERT PATRICK GUIMONT, ET AL.,

Cross-Petitioners,

v.

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner is Bear Creek Associates, an intervening party in the original state court action. Cross-Petitioner respectfully urges that if the Court grants the Petition for Writ of Certiorari filed by the Washington Director of Community Development, that it also grant this Cross-Petition to enable the Court to address fully the relevant issues in this case.

I. OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 121 Wash. 2d 586, 854 P.2d 1 (1993), and is reproduced in the Petitioner's Appendix A. The Order denying Petitioner's timely motion for reconsideration is reproduced at Petitioner's Appendix C. The oral decision and order of the Superior Court for Thurston County, Washington, are unreported and are reproduced at Petitioner's Appendices D and E.

II. JURISDICTION

The decision of the Washington Supreme Court was entered on June 10, 1993. Petitioner's motion for reconsideration was denied on September 10, 1993. This Court has jurisdiction under 28 U.S.C. § 1257(a). A Petition for Writ of Certiorari was received by Cross-Petitioners on December 9, 1993, and this Cross-Petition is timely filed pursuant to Supreme Court Rule 12.3.

III. CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution, which provides in part:

> [N]or shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution, which provides in part:

> No state shall . . . deprive any person of life, liberty or property without due process of law . . .

The Mobile Home Relocation Assistance Act ("the Act"), Chapter 201, Laws of Washington, 1989, and amended in Chapter 171, Laws of Washington, 1990, which is reproduced at Petitioner's Appendices F and G.

IV. STATEMENT OF THE CASE

The Cross-Petitioner accepts and incorporates by reference the Counterstatement of Facts presented in Respondent's Opposition to the State's Petition.

V. REASONS FOR GRANTING THE CROSS-PETITION

I. Review of the Due Process Issue Raised in the Petition Cannot Be Complete Without a Review of the Takings Issue Raised in the Cross-Petition.

A. The Washington State Supreme Court Has Inextricably Linked Its Analysis Of Substantive Due Process Law With Its Pronouncements on Takings Law.

The case at bar, *Guimont v. Clarke*, is the most recent in a series of decisions[1] in which the Washington State

[1] *Orion Corp. v. State*, 109 Wash. 2d 621, 747 P.2d 1062 (1987) (*Orion* II), *cert. denied*, 486 U.S. 1022, 100 L.Ed 2d 227, 108 S.Ct. 1996 (1988); *Presbytery of Seattle v. King Cy.*, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911, 112 L.Ed.2d 238, 111 S.Ct.

Supreme Court has attempted to develop a set of rules for consideration of substantive due process and takings issues in the land use context. In setting forth its rules, the court in *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907 (1990) determined that one or both analyses might apply. The court set up a "threshold test" to establish whether a reviewing court should utilize a "takings" analysis or a due process analysis. See 787 P. 2d at 912.

The Washington court has recognized that its rules are designed to shift cases away from a takings analysis and move them into a due process analysis. In *Presbytery*, the court acknowledged that under its threshold inquiry, "many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a 'takings' formula." 787 P.2d at 914. The state court explained its concern that "choosing to invoke the takings analysis instead of the due process test" might trigger the specter of State financial liability and intimidation of the legislative body, "a situation about which we have previously expressed concern." *Presbytery*, 787 P.2d 907, n.20.

If this Court chooses to grant the state's Petition for Writ of Certiorari and to address Washington's application of substantive due process law in the land use context, the Court also should grant the Cross-Petition and address the takings issue. Because Washington's substantive due process and takings law have been developed

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284 (1990); *Robinson v. Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992); *Sintra, Inc. v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765 (1992); *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993).

together within the same cases, this Court could hardly consider Washington's due process rules without analyzing the "threshold inquiry" the Washington Supreme Court uses to determine which constitutional provision to apply.

B. Because the State Court Has Ruled That the Development Fee Is an Unfair Shifting of Public Burdens onto an Individual Property Owner, Either the Fee is "Unduly Oppressive" and Therefore Violates Substantive Due Process Guarantees, or the Unfair Shifting of Public burdens Violates the Takings Clause Principles Set Forth in Armstrong v. United States, 364 U.S. 40, 49, 41 L.Ed.2d 1554, 80 S.Ct. 1563 (1960).

Armstrong pointed out that the Just Compensation Clause of the Fifth Amendment is a barricade in the way of government action. It stands "to bar government from forcing some people alone to bear public burdens which should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

In *Guimont*, the Washington Supreme Court held the relocation fee was unduly oppressive because it involved a shifting of public burdens to individuals. *Guimont*, 854 P.2d 1 at 15. *Guimont* observed that "the state is placing the burden of solving housing problems on the shoulders of a few", when it is a "burden of society as a whole" *Id.* 16. If this Court grants review and rules that undue oppressiveness is not a criterion of substantive due process, this Court should then consider whether the same unfairness triggers Takings Clause protection. Of course,

prior Supreme Court precedent is clear that unfair shifting of social burdens onto property owners is precisely what the Takings Clause was intended to prevent. See e.g., *Armstrong; Penn Central Transportation Company v. New York,* 438 U.S. 104, 136, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978); *Nollan v. California Coastal Commission,* 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987); *Yee v. Escondido,* ___ U.S. ___, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992).

Review of the unduly oppressive standard necessarily is related to the unfairness principle of takings law. This Court, if certiorari is granted, should have the full opportunity to address both the due process and takings issues. Accordingly, this Cross-Petition which raises the takings issue should be granted if the petition is granted.

II. Washington Takings Law Regarding Exactions Is Hopelessly Confused And Directly At Odds With This Court's Precedent; This Court Has Clearly Indicated The Analysis To Be Utilized In Evaluating An Unconstitutional Exaction And The Washington Court Has Consistently Deviated From That Analysis.

Lucas v. South Carolina Coastal Commission, ___ U.S. ___, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992) confirms that regulatory takings analysis should begin with application of the two bright-line tests articulated in *Agins v. Tiburon,* 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980). *Lucas* states:

> As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests or *denies an owner economically viable use of his land.*'

Lucas, 120 L.Ed.2d at 815 (emphasis by Court) (quoting *Agins*, 447 U.S. at 260).

Lucas also explains that if neither of these two tests is violated, and thus the regulation does not constitute a "categorical" taking, the regulation still may cause a taking under the Court's *ad hoc* factual inquiry. *Lucas*, 120 L.Ed.2d at 815 n.8. The *ad hoc* inquiry focuses on "the economic impact of the regulation" and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* Significantly, there is no need to address these factors if a taking can first be found through either of the clear tests stated in *Agins* and *Lucas*.

Nollan v. California Coastal Comm'n, supra, applied the substantial advancement/nexus test to review whether an exaction requiring provision of a beachfront easement is a legitimate exercise of regulatory power. *Nollan*, 483 U.S. at 834 n.3. *Nollan* explained that the substantial advancement test reviews both the ends and means of the regulation. This Court, in *Nollan*, recognized that the Coastal Commission had a legitimate objective of providing greater public access along the beach and that acquisition of more access furthered it. The means of acquisition employed, however, were improper. *Nollan* observed that there was no basis for requiring the Nollans to contribute a beachfront easement because their proposed house did not impair existing rights of access. According to *Nollan*, it would have been proper to attach

such a condition to the issuance of a building permit only if there had been a close nexus between the easement condition and the cure of an adverse impact of the project. The actual condition imposed was improper because it singled out the Nollans and required them to provide a benefit which should have been provided by the public as a whole.

The decision at bar continues a pattern in Washington takings decisions which refuse to apply the *Nollan* nexus analysis to the review of development fees.

The problem with the Washington Supreme Court's application of the *Nollan* substantial advancement/nexus test is quite apparent in *Sintra v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765 (1992). The case involved a Seattle ordinance which required property owners, as a condition of converting low income housing units to another use, either to build replacement units or to pay a substantial fee for replacement of such housing. Although the court in *Sintra* had concluded that the exaction at issue was a blatant attempt to shift the social cost of homelessness to a discrete segment of property owners, the court nevertheless held that *Nollan's* nexus analysis did not apply. Ignoring *Nollan*, *Sintra* did not analyze whether the means of advancing the City's legitimate objective of providing low-cost housing by shifting responsibility to fund such housing to a small portion of the population was proper. The court in *Sintra* erroneously stated that *Nollan's* analysis only applies when a physical invasion is involved. *Sintra*, 829 P.2d 765, 773, n.7. *Sintra* concluded that the exaction would not effect a taking because the money raised substantially advanced legitimate state interests. 829 P.2d at 774.

Contrary to the Washington Supreme Court's approach, there is no basis for characterizing *Nollan* as a physical invasion case.[2] A noted commentator on takings law stated:

> The Supreme Court decision in *Yee*, issued six weeks prior to *Sintra*, expressly rejected the notion that *Nollan* was a physical invasion case or that its principles were limited to a physical invasion context. In *Yee*, the property owners attempted to characterize a rent-control provision as working a physical invasion taking. The Supreme Court explained that the rent control provision did not result in a taking by physical occupation, but instead suggested that the ordinance should have been analyzed as a potential regulatory taking. Citing *Nollan*, the Court explained that the rent control ordinance may cause 'a regulatory taking' depending on 'whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.' This inquiry under *Nollan* 'has nothing to do with whether the ordinance causes a physical taking.'

J. Groen, R. Stephens, *Takings, Lucas and the Growth Management Act*, 16 U. Puget Sound L.Rev. 1259 (1993).[3]

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[2] The example which this Court utilized in *Nollan* to exemplify an improper development condition, e.g., payment of a fee to be allowed to shout "fire" in a crowded theater in violation of a regulation prohibiting such conduct was an exaction requiring payment of a fee. See e.g., *Nollan*, 483 U.S. at 837.

[3] The article by J. Groen, R. Stephens, *Takings, Lucas And The Growth Management Act*, will soon be published in Volume 16 of the U. Puget Sound Law Review. The pagination indicated above could change upon publication.

Although the exaction in *Nollan* involved an easement over land, *Yee* makes it clear that *Nollan's* substantial advancement/nexus analysis is based on constitutional principles that do not change because the government demands money rather than land. *Nollan* notes that its approach to the analysis of exactions "is consistent with the approach taken by every other court that has analyzed this question with the exception of the California state courts" and cites 23 cases from various U.S. jurisdictions dealing with exactions. *Nollan, supra* at 839. Nine of the cases cited by *Nollan* deal with exactions which require payment of a fee.[4]

Robinson v. Seattle, 119 Wash. 2d 34, 830 P.2d 318, cert. denied, 121 L.Ed.2d 598, 113 S.Ct. 676 (1992) also declined to apply the *Agins/Nollan* substantial advancement test to evaluate a development condition which required individuals tearing down low-cost housing to make a payment into the City's Housing Replacement Fund (the same ordinance which was at issue in *Sintra*). *Robinson* concluded that there was no taking because the property owners had not been denied *all* use of their property,

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[4] *J.E.D. Associates Inc. v. Town of Atkinson,* 121 N.H. 581, 432 A.2d 12 (1981); *Briar West v. Lincoln,* 206 Neb. 172, 291 N.W.2d 730 (1980); *State ex rel. Noland v. St. Louis County,* 478 S.W.2d 363 (Mo. 1972); *Longbridge Builders v. Planning Bd. of Princeton,* 52 N.J. 348, 245 A.2d 336 (1968); *Jordan v. Menomonee Falls,* 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dism'd, 385 U.S. 4 (1966); *College Station v. Turtle Rock Corp.,* 680 S.W.2d 802 (Tex., 1984); *Collis v. City of Bloomington,* 310 Minn. 5, 246 N.W.2d 19 (1976); *Longboat Key v. Lands End., Ltd.,* 433 So.2d 574 (Fla. App. 1983); *Jenad, Inc. v. Scarsdale,* 18 N.Y.2d 78, 218 N.E.2d 673 (1966).

totally disregarding the *Nollan* substantial advancement/ nexus test. Mr. Groen states:

> . . . Specifically, despite what should have been a clear application of *Nollan*, the *Robinson* decision held that there was no facial taking because the property owners were not denied all use of the property. The problem with this analysis is that it ignores the *Nollan* basis for a taking. The United States Supreme Court has stated that whether there has been a denial of all economic use is irrelevant to the substantial advancement test applied in *Nollan*. For example, in *Nollan*, the owners were not denied all use of their land; the Nollans received their building permit. But this had no effect on the analysis of the impropriety of the condition attached to the permit. Likewise, in *Yee v. Escondido*, the Court stated that whether a regulation meets the substantial advancement test 'does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property.'

J. Groen, *supra* at 1298.

The Washington Supreme Court, in the case at bar, again overlooked the obvious application of *Nollan* principles and thus failed to apply properly its substantial advancement/nexus test. *Guimont* simply reasoned that the money raised would be used for addressing a legitimate government concern, and, therefore, substantially advanced a legitimate state interest. Missing entirely from the analysis is the "essential nexus" requirement spelled out by this Court in *Nollan*.

Nollan clearly requires consideration of both the means and end of a regulation to determine whether an exaction is a legitimate exercise of regulatory power. *Guimont* only examined the objective of the relocation fee statute. It failed to consider whether the means used to attain the legitimate state objective were proper. *Guimont* did not analyze (1) whether the financial assistance requirement imposed on mobile park owners was a condition which mitigated an adverse impact of the park owners' development proposal, and (2) whether the State should have singled out park owners to bear the social burden of providing financial aid to displaced mobile home tenants.

When *Guimont* concluded that the relocation fee statute was not a taking, it disregarded the fact that a paramount concern of this Court, expressed in its taking clause decisions in *Armstrong* and *Nollan*, is with land use regulations which go too far and impose the burden of achieving public objectives on a few individuals rather than society as a whole.

Guimont stated that the means utilized by the relocation fee statute were oppressive:

> An individual park owner who desires to close a park is not significantly more responsible for those general society wide problems than is the rest of the population.

Guimont, 854 P.2d at 15.

Guimont also noted:

> Yet by requiring the closing park owner to pay the costs which can amount to extremely high sums of money, the State is placing the burden

> of solving housing problems on the shoulders of a few.

Id.

Remarkably, however, the Washington Supreme Court in *Guimont* neglected to discern, that its concern that a few individuals should not bear financial responsibility for social problems, mirrors the concern expressed by this Court in *Nollan*, and was one of the reasons this Court concluded that the exaction at issue in *Nollan* was a taking. Mr. Groen states:

> Significantly the analysis in *Sintra* and *Robinson* [this article was written before *Guimont*] parallels the concerns expressed in *Nollan* . . . in the same manner, in *Sintra* and *Robinson* providing low income housing was a proper objective for a government to pursue – the problem was the lack of legitimate regulatory justification for imposing the remedy on land owners. Under *Nollan*, using the permitting authority to shift such costs is a taking.

J. Groen, *supra* at 1839.

III. Accepting Review of the Takings Issue in *Guimont* Would Complement This Court's Review of *Dolan v. Tigard*, a Case Which This Court Has Recently Decided to Review.

Dolan v. Tigard, 317 Or. 110, 854 P.2d 437 (1993) addressed the constitutionality of exactions which required a property owner constructing a building to provide land for a bicycle/pedestrian path easement, and a floodplain area for public storm water control. In *Dolan*, this Court will review the nexus analysis. In particular,

the Court will clarify whether there need be a precise match or fit between the imposition of development conditions and the mitigation of adverse impacts or whether only a loose, tenuous relationship, which can be rationally justified, will suffice.

Accepting review of the takings issue in *Guimont* would allow this Court to affirm that the nexus analysis set forth in *Nollan* applies to development exactions when the item demanded by government is money, rather than real property.

IV. This Court Should Accept Review of the Takings Issue in Guimont Because the Washington Supreme Court's Threshold Analysis has Resulted in Abridgement of the Protection Afforded to Washington Citizens by the Just Compensation Clause of the Fifth Amendment.

The decision of the Washington Supreme Court to review land use regulations involving unconstitutional exactions in cases such as *Guimont*, *Sintra* and *Robinson* under a substantive due process analysis, rather than invoking the takings analysis to avoid having a "chilling effect"[5] on legislative bodies, has significantly reduced the Fifth Amendment protection available to Washington citizens. Washington citizens, like other United States citizens, are entitled to full protection of the Takings Clause and to just compensation if the government takes their property for a public purpose.

It would be appropriate for this Court to review the constitutionality of Washington's takings analysis if the

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[5] *Sintra*, 829 P.2d 765, 772.

Court decides to review substantive due process claims raised in the State's Petition.

VI. CONCLUSION

This Court has before it the Petition of the State which raises the question of whether undue oppressiveness is part of the analysis of a substantive due process claim. If this Court accepts review of the State's Petition and rules that undue oppressiveness is not a component of the substantive due process analysis, this Court should grant review of this Cross-Petition and consider whether undue oppressiveness is part of the analysis of takings claims. The only way to have that issue before the Court is to grant the Cross-Petition of Respondent. This Cross-Petition would also give this Court the opportunity to clarify that the *Nollan* nexus analysis applies to development fee exactions.

Respectfully submitted,

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